24TH FEDERAL LITIGATION COURSE

PLEADINGS AND MOTION PRACTICE

I. INTRODUCTION.

A. Background.

B. Purpose of the Federal Rules of Civil Procedure.

II. PAPER MANAGEMENT IN THE FEDERAL COURTS.

A. Pleadings, Motions, and Other Papers.

1. Pleadings. Fed. R. Civ. P. 7(a).

a. "Pleadings" are limited to the complaint, answer, reply to a counterclaim, answer to a crossclaim, third-party complaint, and third-party answer.

b. No other "pleadings" are allowed, except the court can order a reply to an answer or a third-party answer.

c. All of the above can be considered under the general heading of complaint, answer, and reply.

d. Definition becomes important when taken in context of other rules. E.g., Fed. R. Civ. P. 12(c) which provides for judgment on the pleadings; Fed. R. Civ. P. 15(a) which allows a party to amend once as of right any time before a responsive pleading is served.

2. Motions and other papers. Fed. R. Civ. P. 7(b).

a. A motion is an application to the court for an order.

b. Must be in writing (unless made during a hearing or trial), must state with particularity the grounds, and must set forth the relief or order sought.

c. Fed. R. Civ. P. 7(b)(2) provides that the rules as to caption and other matters of form apply to motions and other papers.

d. Local court rules may substantially impact motion practice by limiting number of pages, setting time requirements for notice, response, etc.

B. Signing Pleadings, Motions, and Other Papers. Fed. R. Civ. P. 11.

1. Background.

a. Prior to 1 August 1983, the signature of an attorney on a pleading or motion certified that to the best of the signer's belief "there is good ground to support it."

b. Whether a particular document was signed in violation of Rule 11 required the court to conduct a subjective inquiry into the lawyer's knowledge and motivation for signing. "Good faith" was a defense, and sanctions were imposed only upon a determination that the lawyer acted willfully or in bad faith.

c. Sanctions were seldom imposed, and frivolous pleadings that caused delay and increased the cost of litigation were becoming more numerous. In 1983, Rule 11 was amended to address these problems.

d. The 1993 amendments to the rule were intended to remedy problems that arose in interpretation of the rule but retained the principle that attorneys and *pro se* litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1 to “secure the just, speedy, and inexpensive determination of every action.”

2. Requirements of Rule 11.

a. Every pleading, motion, or other paper shall be signed by an attorney of record. If the party is not represented by an attorney, the party must sign.

b. Signature certifies that:

(1) the person signing has read the document [While not expressly stated in the rule, the obligations imposed by the rule obviously require that a signer first read the document.];

(2) to the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact (has or is likely to have evidentiary support) and is warranted by existing law or a good faith (non-frivolous) argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

c. Current rule imposes an objective standard by which to measure the actions of the litigants. "Simply put, subjective good faith no longer provides the safe harbor it once did." Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). Accord Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997); F.D.I.C. v. Calhoun, 34 F.3d 1291 (5th Cir. 1994); Pacific Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113 (7th Cir. 1994); Blackhills Institute of Geological Research v. South Dakota School of Mines and Technology, 12 F.3d 737 (8th Cir. 1993); Paganucci v. New York, 993 F.2d 310 (2d Cir. 1993) (The standard is whether a reasonably competent attorney would have acted similarly.).

d. Whether the required inquiry into the law and the facts of the case is "reasonable" will depend upon the facts and circumstances of the particular case. The following factors have been considered by the courts to determine the appropriateness of the presignature inquiry:

(1) As to the facts:

(a) the time available for investigation;

(b) the extent of the attorney's reliance upon the client for the factual basis of the document;

(c) the feasibility of a prefiling investigation;

(d) whether the attorney accepted the case on referral from another attorney;

(e) the complexity of the issues; and

(f) the extent to which development of the facts underlying the claim requires discovery.

Childs v. State Farm Mutual Automobile Insurance Co., 29 F.3d 1018, 1026 (5th Cir. 1994).

(2) As to the law:

(a) the time available to prepare the document before filing;

(b) the plausibility of the legal view contained in the document;

(c) whether the litigant is pro se; and

(d) the complexity of the legal issues involved.

Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 875-76 (5th Cir. 1988). See, e.g., Rode v. United States, 812 F.Supp. 45 (M.D. Pa. 1992)(Rule 11 sanctions not imposed against plaintiff's counsel in FTCA suit against U.S. where plaintiff's counsel cited court opinions, albeit from districts outside circuit, in support of more liberal approach to construing jurisdictional prerequisites to FTCA action). Cf. Knipe v. United States, 151 F.R.D. 24 (N.D.N.Y. 1993)(FTCA action against FAA raised frivolous arguments and was brought for improper purpose, warranting imposition of Rule 11 sanctions on plaintiff's attorney).

e. The courts *were* split on whether compliance is measured at the time the document is signed and filed or if there is a continuing duty to amend when additional information reveals that the claim is frivolous or that the allegations are unsupported. Compare Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988) (no continuing duty); with Kale v. Combined Ins. Co. of America, 861 F.2d 746 (1st Cir. 1988) (continuing duty). The 1993 amendments to the rule make clear that although a formal amendment to pleadings may not be required, Rule 11 is violated by continuing to assert ("later advocating") claim or defense after learning that it has no merit.

3. Sanctions for Violations of Rule 11.

a. "If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11] has been violated, the court may…impose an appropriate sanction upon the attorneys, law firms, or parties that have violated [the rule]." Fed. R. Civ. P. 11(c).

b. Sanctions can be imposed upon the attorneys, the law firms, or the parties that have violated the rule or who are responsible for the violation. (Usually the person signing, filing, submitting or advocating a document.) **"**Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Fed. R. Civ. P. 11(c)(1)(A). Sanctions may be imposed upon pro se litigants who violate Rule 11, although the court should consider plaintiff's pro se status in determining whether the filing in question was reasonable. Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988); Brown v. Consolidated Freightway, 152 F.R.D. 656 (N.D. Ga. 1993). Cf. Clark v. Green, 814 F.2d 221 (5th Cir. 1987) (imposing sanctions under Rule 38 of Fed. R. App. P. against pro se litigant for totally frivolous appeal).

c. Sanctions may include: striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other education programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. Also, the Court may award reasonable expenses and attorney's fees to the prevailing party. See Blue v. U.S. Dept. of Army, 914 F.2d 525 (4th Cir. 1990)(government awarded costs and attorneys' fees for plaintiff's bad faith pursuit of employment discrimination action), cert. denied 499 U.S. 959 (1991).

d. Compensatory awards should be limited to unusual circumstances. Non-monetary sanctions are proper and suggested. Sanctions are "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). See Sato v. Plunkett, 154 F.R.D. 189 (N.D. Ill. 1994).

e. Safe harbor provision: Motion for sanctions shall be made and served separately and may be filed with the court only if the challenged paper, claim, or defense is not withdrawn or corrected within 21 days after service. Fed. R. Civ. P. 11(c)(1)(A).

f. Ordinarily a motion for sanctions should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. See Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC, 339 F.3d 1146 (9th Cir. 2003)(sanctions award precluded because motion was served after complaint had been dismissed and the period within which an amended complaint could be filed had expired).

g. Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by the rule.

4. Rule 11 does not apply to discovery. Fed. R. Civ. P. 11(d). However, Rules 26(g) and 37 establish similar certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions.

C. Commencing the Action.

1. "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

2. "Filing" is accomplished by complying with local rules as to delivery of the requisite number of copies of the complaint to the clerk of court's office and having the complaint logged into the court's docket file. A pleading, motion, or other paper is not "filed" until received by the clerk; depositing a document in the mail is not "filing." Cooper v. Ashland, 871 F.2d 104 (9th Cir. 1989); Torras Herreria v. M/V Timur Star, 803 F.2d 215 (6th Cir. 1986).

3. Under federal question jurisdiction, the statute of limitations is tolled by the filing of the complaint with the court. West v. Conrail, 481 U.S. 35 (1987); Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). If jurisdiction is based upon diversity of citizenship and the state statute specifies that the period of limitations is tolled only upon service of process, the state rule will apply. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

D. Service of Process.

1. "Upon or after the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant." Fed. R. Civ. P. 4(b).

2. The summons is signed by the clerk, under the seal of the court. It should set out the name of the parties, the name of the court, and the name and address of the plaintiff or his attorney, if represented. It also should state the time within which the defendant must appear and defend, and warns that failure to respond in a timely fashion will result in default. See Fed. R. Civ. P. 4(a).

3. If the plaintiff fails to serve the summons and complaint within 120 days of commencing the action, the court "shall" (upon motion or on its own initiative) dismiss the action without prejudice or direct that service be effected within a specified time unless plaintiff can show good cause why service was not made within the period specified. Fed. R. Civ. P. 4(m). Momah v. Albert Einstein Medical Center, 158 F.R.D. 66 (E.D. Pa. 1994); See also Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987); Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987). Ignorance of Rule 4(m) by pro se litigants does not excuse their failure to serve within 120 days. Lowe v. Hart, 157 F.R.D. 550 (M.D. Fla. 1994).

4. Serving the United States.

   a. Pursuant to Rule 4(i)(1), service on the United States shall be effected:

      (1) By delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or to an Assistant United States Attorney or designated clerical employee, or by sending a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney; and,

      (2) By also sending a copy of the summons and complaint by registered or certified mail to the Attorney General in Washington; and,

(3) If attacking the validity of an order of an officer or agency of the United States not made a party, by sending a copy of the summons and complaint by registered or certified mail to such officer or agency.

b. Note that the waiver of service provisions of Rule 4(d), discussed below, are not applicable to the United States as a defendant.

5. Pursuant to Rule 4(i)(2)(A), service on an officer (in his or her official capacity only) or an agency of the United States shall be effected:

a. By serving the United States (meaning service on the U.S. Attorney and the Attorney General as discussed above); and,

b. By sending a copy of the summons and complaint by registered or certified mail to the named officer or agency. Service beyond the territorial limits of the forum state may be authorized by 28 U.S.C. § 1391(e).

c. Note that the waiver of service provisions of Rule 4(d), discussed below, are not applicable to United States officers or agencies.

d. The court shall allow a plaintiff who fails to effect service properly on a United States agency or officer served in his/her official capacity a “reasonable time" to cure defects in service, provided plaintiff has effected service on either the U.S. Attorney or the Attorney General. Fed. R. Civ. P. 4(i)(3)(A).

6. Pursuant to Rule 4(i)(2)(B), service on an officer or an employee of the United States (in his or her individual capacity – whether or not the officer or employee is sued also in an official capacity) for “acts or omissions occurring in connection with the performance of duties on behalf of the United States” shall be effected:

a. By serving the United States (meaning service on the U.S. Attorney and the Attorney General as discussed above); and,

b. By serving the officer or employee in the manner prescribed by Rule 4 (d), (e), (f), or (g).

c. Note that the waiver of service provisions of Rule 4(d), discussed below, **do** apply.

d. Includes former employees.

e. The court shall allow a plaintiff who fails to effect service properly on the United States "reasonable time" to cure defects in service required by Rule 4(i)(2)(B), provided plaintiff has effected service on the officer or employee of the United States sued in an individual capacity. Fed. R. Civ. P. 4(i)(3)(B).

7. Service on an individual defendant.

a. Service upon individuals within a judicial district of the United States is effected:

(1) By delivering a copy of the summons and complaint to him/her personally or by leaving copies at his/her house or usual place of abode with some person of suitable age and discretion who also resides at the house or by delivering copies to an agent authorized by appointment or by law to receive service of process (Fed. R. Civ. P. 4(e)(2)); or,

(2) By serving the defendant in accordance with the law of the state wherein the district court sits. Fed. R. Civ. P. 4(e)(1); or,

(3) By obtaining the defendant's waiver of service as specified in Rule 4(d).

b. Service upon individuals in a foreign country is effected:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (entered into force for the United States on February 10, 1969); or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service (provided that such method of service is reasonably calculated to give notice):

(a) in the manner prescribed by the law of the foreign country for service in that country;

(b) as directed by a foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by law of the foreign country, by delivery to the individual personally, or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served (Fed. R. Civ. P. 4(f)(2)); or

(3) By other means not prohibited by international agreement as may be directed by the court. Fed. R. Civ. P. 4(f)(3).

(4) Service may also be effected by obtaining the defendant's waiver of service as specified in Rule 4(d).

c. Waiver of service. Fed. R. Civ. P. 4(d).

(1) Plaintiff sends notice, request for waiver and copy of the complaint by reliable means, along with an extra copy and a prepaid means of compliance. Must allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent (60 days if the defendant is outside the United States).

(2) Defendant bears costs for effecting formal service unless "good cause" shown for failure to consent to waiver.

(3) A defendant that waives formal service is entitled to 60 days after request for waiver sent to answer the

complaint (90 days if the defendant is outside the United States).

8. Service of process on the installation.

a. Commanders and officials will not evade service of process in actions brought against the U.S. or themselves concerning official duties. Reasonable restriction on the service of process on the installation may be imposed.

b. If acceptance of service would interfere with duty--appoint agent or representative to accept service.

III. COMPLAINT AND ANSWER.

A. Complaint.

1. Format.

a. "Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a)." Fed. R. Civ. P. 10(a).

b. The caption of the complaint must contain the names of all parties; subsequent pleadings need only contain the name of the first party on each side with appropriate indication of other parties (such as “et al.”). Fed. R. Civ. P. 10(a).

c. Averments must be set forth in separate numbered paragraphs. Claims founded upon separate transactions or occurrences should be set forth in separate counts. Fed. R. Civ. P. 10(b).

2. Contents. Fed. R. Civ. P. 8(a).

a. A short and plain statement of the grounds upon which the court's jurisdiction is based.

b. A short and plain statement of the claim showing that the pleader is entitled to the relief sought.

c. A demand for judgment for the relief the plaintiff deems himself entitled. Alternative and various types of relief may be demanded in the same complaint.

d. Courts may liberally construe the pleadings of *pro se* litigants.

B. Answer.

1. Format. Fed. R. Civ. P. 10.

2. Contents. Fed. R. Civ. P. 8(b)&(c).

a. "A party shall state in short and plain terms his defenses to each claim asserted. . . ." Fed. R. Civ. P. 8(b).

(1) Rule 8(c) sets forth those defenses that must be pled affirmatively.

(2) Under Rule 10(b) each affirmative defense should be set forth in a separate numbered paragraph.

(3) If you fail to plead an affirmative defense, it *may* be waived. Compare Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990)(failure of United States to affirmatively plead as a defense to an FTCA action the Louisiana Medical Malpractice Act limitation on damages resulted in waiver of that defense) with Owen v. U.S., 935 F.2d 734 (5th Cir. 1991)(fact that U.S. pled the cap and specifically noted it in pre-trial order distinguishes Simon).

(4) But the "technical" failure to plead an affirmative defense may not be fatal. See Blaney v. United States, 34 F.3d 509, 512 (7th Cir. 1994)(Air Force's failure to plead statute of limitations as an affirmative defense in answer did not constitute a waiver of the matter where the Air Force raised the issue in a motion to dismiss and the district court chose to recognize the defense). Cf. Harris v. Secretary, Dep't of Veterans Affairs, 126 F.3d 339, 345 (D.C. Cir. 1997)(holding that a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion).

(5) The defendant may seek leave to amend, pursuant to Rule 15(a), to add an affirmative defense. Such leave should be freely granted when the interests of justice so require. See Phyfer v. San Gabriel Development Corp., 884 F.2d 235, 241 (5th Cir. 1989)(district court properly granted leave to amend answer to add affirmative defense of collateral estoppel where there was no unfair surprise to the plaintiff). See also Sanders v. Dep't of the Army, 981 F.2d 990, 991 (8th Cir. 1992)(district court did not abuse its discretion in allowing government to raise statute of limitations in motion to dismiss filed two months after its answer, when, *inter alia*, the court properly granted government leave to amend its answer to expressly include the omitted limitations defense).

b. "A party…shall admit or deny the averments upon which the adverse party relies." Fed. R. Civ. P. 8(b).

(1) Must admit or deny each allegation of the complaint. May deny specific allegations of specific paragraphs and admit the remainder, or may make general denial with specific admissions. For example:

- "Paragraph #__ is admitted."
- "Admitted that ____. Denied that _____.
- "The first sentence of paragraph #__ is admitted. The remainder of paragraph #__ is denied."
- #__. Admitted.
- "Plaintiff admits that _____ and denies that _____."

(2) Failure to deny constitutes an admission.

(3) If pleader is without knowledge or information sufficient to form a belief as to the truth of an allegation, he can so state in his answer and it will have the effect of a denial.

(4) Can enter a general denial to all the allegations of the complaint, BUT, consider Rule 11.

3. Time to answer.

a. Government and official capacity defendants have 60 days to answer; private defendant has 20 days. Fed. R. Civ. P. 12(a). Government employee sued for acts or omissions occurring in connection with the performance of duties on behalf of the United States have 60 days to answer, counting from later of: service on officer or employee, or service on the United States attorney. Fed. R. Civ. P. 12(a). If service of summons is waived under Rule 4(d), then 60 days after request for waiver. Id.

b. A motion served under Rule 12 enlarges the time to answer until ten days after notice of the court's action on the motion (unless a different time is fixed by court order). Fed. R. Civ. P. 12(a)(4).

IV. MOTION PRACTICE.

A. General.

B. Motion to Dismiss. Fed. R. Civ. P. 12(b).

1. Federal courts simply require notice pleading and must construe pleadings liberally in ruling on motions to dismiss. Clorox v. Chromium Corp., 158 F.R.D. 120 (N.D. Ill. 1994) (citing, inter alia, Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993)).

2. Lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).

a. Except for Supreme Court's original jurisdiction, federal judicial power is dependent upon a statutory grant of jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1992); Stevenson v. Fain, 195 U.S. 165, 167 (1904).

b. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936).

c. Lack of jurisdiction over the subject matter cannot be waived and can be raised for the first time on appeal. In fact, any court considering a case has a duty to raise the issue sua sponte if it appears that subject matter jurisdiction is lacking. Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988).

d. A "facial attack" on the court's jurisdiction goes to whether the plaintiff has properly alleged a basis of subject matter jurisdiction. A "factual attack" challenges the existence of subject matter jurisdiction in fact, regardless of the allegations in the complaint. Matter outside the complaint may be considered by the court in resolving the issue. See, e.g., Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981); Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir.), cert. denied, 449 U.S. 953 (1980).

e. Considering matters outside the pleadings does not convert a motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment and the dismissal is not an adjudication on the merits. Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987); Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981). But cf. Sutton v. United States, 819 F.2d 1289, 1299 (5th Cir. 1987) (when determination of waiver of sovereign immunity requires factual development, court should permit limited discovery and require parties to submit the issue by summary judgment rather than by a motion to dismiss). Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S 986 (1987) (when subject matter jurisdiction is intertwined with the underlying claim, the issue should be resolved under Rule 12(b)(6) or Rule 56).

f. Sovereign Immunity.[1]

(1) The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit. United

[1] May also be asserted as failure to state a claim under Rule 12(b)(6).

States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

(2) With regard to the sovereign immunity of officials and agencies of the United States, as opposed to the United States itself, the general rule is that the suit is, in effect, a suit against the United States when the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or compel it to act. Dugan v. Rank, 372 U.S. 609, 620 (1963).

(3) In suits against federal officials for money damages directly under the Constitution (Bivens suits), the principle of sovereign immunity does not apply, since the suit is against the federal official personally (i.e., in his individual capacity as opposed to his official capacity.)

(4) Commonly asserted provisions that waive sovereign immunity:

- The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).
- The Federal Tort Claims Act, 28 U.S.C. § 1346(b).
- The Freedom of Information Act, 5 U.S.C. § 552.
- The Privacy Act, 5 U.S.C. § 552a.
- The Unjust Conviction Act, 28 U.S.C. §§ 2513, 1495.
- The Equal Access to Justice Act, 28 U.S.C. § 2412(b) & (d); 5 U.S.C. § 504.
- The Civil Rights Act of 1991.
- The Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq. However, the APA does not contain a specific jurisdictional grant. 28 U.S.C. § 1331 (federal question jurisdiction) can

furnish the basis for a suit under the APA. See Califono v. Sanders, 430 U.S. 99 (1977); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir. 1985).

(5) Commonly asserted provisions that *do not* waive sovereign immunity for monetary relief:

- The federal question jurisdiction statute, 28 U.S.C. § 1331. See, e.g., Gilbert v. Dagrossa, 756 F.2d 1455 (9th Cir. 1985).
- The commerce and trade regulation statute, 28 U.S.C. § 1337. See, e.g., Hagemeier v. Block, 806 F.2d 197 (8th Cir. 1986), cert. denied, 481 U.S. 1054 (1987).
- The civil rights jurisdiction statute, 28 U.S.C. § 1343. See, e.g., Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).
- The mandamus statute, 28 U.S.C. § 1361. See, e.g., Doe v. Civiletti, 635 F.2d 88 (2d Cir. 1980).
- The Declaratory Judgment Act, 28 U.S.C. § 2201-02. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952); Mitchell v. Ridell, 402 F.2d 842 (9th Cir. 1968).
- The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

(6) Any waiver of sovereign immunity must be strictly construed in favor of the United States.

(7) Congressional conditions on waivers of sovereign immunity are jurisdictional prerequisites to suit. United States v. Dalm, 494 U.S. 596 (1990); Block v. North Dakota, 461 U.S. 273 (1983); Lehman v. Nakshian, 453 U.S. 156 (1981); United States v. Kubrick, 444 U.S. 111 (1979). However, see Irwin v. Veterans Administration, 498 U.S. 89 (1990), which held that the 30-day requirement for filing suit in an EEO case against the government can be equitably tolled.

g. Failure to Exhaust Administrative Remedies.[2]

(1) Statutory Exhaustion Requirement. When the statute itself specifically requires exhaustion of administrative remedies prior to bringing a judicial action, then exhaustion is mandatory. McCarthy v. Madigan, 503 U.S. 140 (1992). Examples:

- Presentation of a Federal Tort Claim to the administrative agency. 28 U.S.C. § 2675.
- Administrative processing of a Title VII complaint of discrimination. 42 U.S.C. § 2000e-16(c).
- Administrative claims for social security disability. 42 U.S.C. § 405(g).

(2) Judicially Mandated Exhaustion. If there is no statute which establishes an administrative remedy, or if the statute does not clearly mandate exhaustion, the court may balance the various factors set out in McCarthy v. Madigan, *supra*, to determine whether administrative exhaustion required. The court will not require exhaustion when the interests of the individual in retaining prompt access outweighs the institutional interests favoring exhaustion, or when undue prejudice exists to the subsequent assertion of court action, such as when there is an unreasonable or indefinite time frame for administrative action, or the administrative remedy is inadequate, or the administrative body is shown to be biased or to have predetermined the issue.

(3) When judicial review of an agency decision is sought under the APA, and the statute or agency rules do not require exhaustion, no judicially-created exhaustion requirement can be imposed. See Darby v. Cisneros, 509 U.S. 137 (1993). See also 5 U.S.C. § 704. But, Darby may have limited applicability to the military. See Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994) (holding that "review of military personnel actions . . . is a unique context with specialized rules limiting judicial

[2] May also be asserted as failure to state a claim under Rule 12(b)(6).

review," and citing Chappell v. Wallace, 462 U.S. 486 (1983)). In some circuits, the military services may continue to assert the exhaustion doctrine as a defense, seeking to distinguish Darby--which was not a military case. See E. Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros*, 166 Mil. L. Rev. 67 (2000)(arguing that *Darby* is inapplicable to military claims). But see Crane v. Sec'y of Army, 92 F.Supp.2d 155, 161 (W.D. N.Y. 2000)("Almost without exception, federal courts throughout this country have also declined to create a military exception to the Court's decision in Darby.").

(4) What remedies must be exhausted?

- Boards for Correction of Military Records. 10 U.S.C. § 1552.
- Discharge Review Boards. 10 U.S.C. § 1553.
- Article 138, UCMJ. 10 U.S.C. § 938.
- Clemency Boards. 10 U.S.C. §§ 874, 951-954.
- Inspector General. 10 U.S.C. § 3039.

(5) Exceptions to the exhaustion doctrine:

- Inadequacy. Von Hoffburg v. United States, 615 F.2d 633 (5th Cir. 1980).
- Futility. Compare Watkins v. United States Army, 541 F.Supp. 249 (W.D. Wash. 1982) and Steffan v. Cheney, 733 F.Supp. 115 (D..D.C. 1989) with Schaefer v. Cheney, 725 F.Supp. 40 (D.D.C. 1989).
- Irreparable injury. Hickey v. Commandant, 461 F.Supp. 1085 (E.D. Pa. 1978).
- Purely legal issues. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).
- Avoiding piecemeal relief. Walters v. Secretary of the Navy, 533 F.Supp. 1068 (D.D.C. 1982),

rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983).

(6) Example of Rule 12(b)(1) motion in DoD litigation: Hoery v. United States, 324 F.3d 1220 (10th Cir. 2003)(reversing district court's order granting government's motion to dismiss for lack of subject matter jurisdiction, and holding that landowner's cause of action under FTCA continued to accrue, for limitations purposes, until removal of toxic chemicals was accomplished).

h. Standing.[3]

(1) The standing inquiry has constitutional, statutory, and judicially formulated components. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)(standing subsumes a blend of constitutional requirements and prudential considerations).

(2) In the constitutional sense, Article III requires that a plaintiff have suffered an injury which is redressable by the court. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). An asserted right to have the government act in accordance with the law does not confer standing. Allen v. Wright, 468 U.S. 737 (1984); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1978).

[3] Sometimes asserted as failure to state a claim under Rule 12(b)(6), but more properly brought as Rule 12(b)(1) motion. See Lipsman v. Secretary of the Army, 257 F.Supp.2d 3, 5 (D.D.C. 2003)("A challenge to the standing of a party, when raised as a motion to dismiss, proceeds pursuant to Rule 12(b)(1).")

(3) In general, in order for the plaintiff to have standing, the plaintiff must show that the challenged action has caused him injury in fact (that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant), and that the interest sought to be protected by him is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Meese v. Keene, 481 U.S. 465 (1987); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970).

(4) A plaintiff may not claim standing to vindicate the constitutional rights of third parties. Tileston v. Ullman, 318 U.S. 44 (1943). A plaintiff may only challenge a statute or regulation in terms in which it is applied to him. Parker v. Levy, 417 U.S. 733 (1974); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981). Exception: if statute confers third–party standing. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

i. Lack of Ripeness (no justiciable case or controversy).[4]

(1) "The conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in original).

(2) Rationale: Avoid premature litigation of suits and protect agencies from unnecessary judicial interference. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), rev'd on other grounds, Califano v. Sanders, 430 U.S. 99 (1977).

[4] May also be asserted as failure to state a claim under Rule 12(b)(6).

(3) In determining whether a case is ripe for adjudication, a court must evaluate the fitness of the issues for judicial decision and determine the hardship to the parties of withholding court decision. Abbott, *infra*.

(4) Examples: Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981).

j. Mootness (no justiciable case or controversy).[5]

(1) "Mootness looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case or controversy' that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

(2) General rule: there is no case or controversy once the issues in a lawsuit have been resolved.

(3) Test: a case becomes moot when: "it can be said with assurance that there is no reasonable expectation …that the alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 635 (1979).

(4) Exceptions:

- Capable of repetition, yet evading review. Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

- Voluntary cessation. United States v. W.T. Grant Co., 345 U.S. 629 (1953); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

[5] May also be asserted as failure to state a claim under Rule 12(b)(6).

- Collateral consequences. Sibron v. New York, 392 U.S. 40 (1968); Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977). Class actions. Sosna v. Iowa, 419 U.S. 393 (1975)(mootness of the class representative's claim after the class has been certified – the case is not moot); United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)(mootness of class representative's claim after motion for class certification made and denied but before appeal from the denial – the case is not moot); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975)(mootness of class representative's claim before class certification – the case may be moot).

k. No remedy; exclusive remedy.[6]

(1) Judicial review may be foreclosed when the statute which creates the rights does not authorize judicial review. See Califano v. Sanders, 430 U.S. 99 (1977)(no judicial review of decisions of the Secretary of HHS to deny a petition to reopen).

(2) When Congress has specially crafted a comprehensive statutory scheme, it is generally the only avenue for judicial action. See Brown v. General Services Administration, 425 U.S. 820 (1976)(Title VII is the exclusive remedy for discrimination in federal employment).

l. Incorrect Defendant.[7]

(1) The only proper defendant in a suit under the FTCA is the United States.

(2) Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, federal employees cannot be held responsible for common law torts. Exclusive remedy is against the United States under the FTCA. See 28 U.S.C. § 2679(b).

[6] May also be asserted as failure to state a claim under Rule 12(b)(6).
[7] May also be asserted as failure to state a claim under Rule 12(b)(6).

(3) The head of the agency is the only appropriate defendant in a Title VII case.

3. Lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2).

a. For suits against the United States, its agencies and officers, the issue arises in the context of whether there has been sufficient process or service of process upon the government such that the court has jurisdiction over the "person" of the United States.

b. For suits against United States officers in their personal or individual capacities (Bivens suits), this defense is important to consider. May be asserted when an individual is sued in a forum other than where he/she resides or is otherwise amenable to personal jurisdiction.

c. Personal jurisdiction, unlike subject matter jurisdiction, is waivable and must be asserted by the defendant. Petrowski v. Hawkeye-Sec. Ins. Co., 350 U.S. 495 (1956).

d. Whether personal jurisdiction over a nonresident defendant is present will depend upon the state long-arm statute and whether the defendant has sufficient "minimum contacts" with the forum to satisfy due process. See International Shoe Co. v. Washington, 326 U.S. 310 (1945).

(1) The plaintiff must comply with the requirements of the state long-arm statute, and

(2) Maintaining the action must not offend "traditional notions of fair play and substantial justice."

4. Improper venue. Fed. R. Civ. P. 12(b)(3).

   a. Generally, actions against the United States, its officers and agencies, can be brought where the defendant resides, where the cause of action arose, where any real property involved is located, or, if no real property is involved, where the plaintiff resides. 28 U.S.C. § 1391(e). In Bivens cases, section 1391(e) does not apply, and venue is a very important consideration.

   b. Like personal jurisdiction, the defense of improper venue may be waived if not raised in a pre-answer motion or in the answer itself. Fed. R. Civ. P. 12(h)(1).

   c. Actions under the FTCA can be brought only where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

   d. Tucker Act claims brought in the district court can only be brought in the district where the plaintiff resides. 28 U.S.C. § 1402(a)(1).

   e. Compare a motion to dismiss under 12(b)(3) with a motion to transfer venue under 28 U.S.C. § 1404(a).

5. Insufficiency of process. Fed. R. Civ. P. 12(b)(4).

   a. The complaint and summons together constitute "process." Fed. R. Civ. P. 4(b) sets out the required form of the summons.

   b. Rule 12(b)(4) motions challenge the form of the process; if process is defective, plaintiff has failed to perfect personal jurisdiction over the defendant.

   c. Rather than dismiss the action, courts will often quash the service and allow plaintiff to re-serve the defendant. Bolton v. Guiffrida, 569 F. Supp. 30 (N.D. Cal. 1983); Boatman v. Thomas, 320 F. Supp. 1079 (M.D. Pa. 1971).

6. Insufficiency of service of process. Fed. R.Civ. P. 12(b)(5).

   a. Challenge to the manner in which process is served. Has the plaintiff complied with Rule 4? See Bryant v. Rohr Ind., Inc., 116 F.R.D. 530 (W.D. Wash. 1987) (case dismissed without prejudice because of *pro se* plaintiff's failure to show good cause for his failure to comply with requirements of Rule 4).

   b. Like Rule 12(b)(4), courts generally will quash the service and retain the case and provide plaintiff with another opportunity to perfect service. Daley v. ALIA, 105 F.R.D. 87 (E.D.N.Y. 1985); Hill v. Sands, 403 F. Supp. 1368 (N.D. Ill. 1975). But see Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987) (dismissal for failure to serve process within 120 days effectively terminates suit with prejudice if statute of limitations has expired). Accord Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987).

   c. In litigation against the United States, its agencies and officers, consider:

      (1) Has the U.S. Attorney been served with a copy of the summons and complaint by hand delivery or by registered or certified mail directed to the appropriate person in accordance with Rule 4(i)?

      (2) Has the Attorney General been served by registered or certified mail in accordance with Rule 4(i)?

      (3) Are individual defendants being sued in their official or individual capacities?

         (a) Official capacity service can be accomplished by certified mail under 28 U.S.C. § 1391(e), or pursuant to Rule 4(i)(2)(A).

         (b) Individual capacity service must be perfected as required for any other private party. If the complaint arguably implicates official activities of the individually-named federal officer defendant, service on the United States is also be required. Fed. R. Civ. P. 4(i)(2)(B).

(4) Has service been made within 120 days of filing? See Lambert v. United States, 44 F.3d 296 (5th Cir.1995)(Plaintiff's first FTCA action dismissed for failure to effect service IAW Rule 4(i) within 120 days and second FTCA action filed against United States dismissed as untimely under FTCA's six month statute of limitations).

7. Failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

a. The modern equivalent to the demurrer.

b. The motion will be granted only if the defendant can demonstrate that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957); Carter v. Cornwell, 983 F.2d 52 (6th Cir. 1993).

c. Factual allegations of the complaint are assumed to be true and all reasonable inferences are made in favor of the nonmoving party. United States v. Gaubert, 499 U.S. 315, 327 (1991).

d. The court's inquiry is limited to the four corners of the complaint; if the court considers matters outside the pleadings, the motion is treated as one for summary judgment under Fed. R. Civ. P. 56. California v. American Stores Co., 872 F.2d 837 (9th Cir.); J.M. Mechanical Corp. v. United States, 716 F.2d 190 (3d Cir. 1983); Biesenbach v. Guenther, 588 F.2d 400 (3d Cir. 1978); Fed. R. Civ. P. 12(b).

e. In the context of Bivens claims and claims alleging fraud, conspiracy, and other civil rights violations, a heightened pleading standard applies, and the operative facts upon which the claim is based must be pled. Mere conclusory allegations are insufficient. See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

f. In a Bivens action, the plaintiff must plead the personal involvement of each defendant and vicarious liability is not allowed. Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390 n.2 (1971).

g. Examples of Rule 12(b)(6) motions in federal litigation:

(1) Absolute official immunity: If allegations of the complaint contain all of the facts upon which the defense of absolute immunity is based, dismissal under Rule 12(b)(6) is appropriate. Imbler v. Pachtman, 424 U.S. 409 (1976).

(2) Nonjusticiable "political questions": Subject matter jurisdiction is present because the matter is a "case or controversy" under Article III, but is otherwise unsuited for judicial resolution because of a constitutional commitment to another branch of government. Gilligan v. Morgan, 413 U.S. 1 (1973).

(3) Feres based immunity of military officers from Bivens actions brought by their subordinates. Cf. Chappell v. Wallace, 462 U.S. 296 (1983).

(4) Nonreviewable military activities: Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

(5) FTCA cases that fail to allege a cause of action under state law: Davis v. Dep't of Army, 602 F. Supp. 355 (D. Md. 1985).

8. Failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7).

9. Timing and waiver of Rule 12(b) motions. Fed. R. Civ. P. 12(h).

a. 12(b) defenses “may at the option of the pleader be made by motion.” However, a motion raising any of the defenses enumerated in that section "shall be made before pleading if a further pleading is permitted." Fed. R. Civ. P. 12(b).

b. If a motion is filed under Rule 12 and the movant omits therefrom the defense of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process, the defense is waived. Fed. R. Civ. P. 12(g)&(h)(1). See Guccione v. Flynt, 618 F. Supp. 164 (S.D.N.Y. 1985) (failure to raise lack of personal jurisdiction in a motion challenging insufficiency of service of process constitutes a waiver of the defense of lack of personal jurisdiction).

c. Failure to include lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process in the answer if no Rule 12 motion is filed constitutes waiver. Fed. R. Civ. P. 12(h)(1). See also Benveniste v. Eisman, 119 F.R.D. 628 (S.D.N.Y. 1988) (insufficiency of service waived even though preserved in the answer but not presented to the court for resolution until almost four years after the action was commenced).

C. Motion for Judgment on the Pleadings. Fed. R. Civ. P. 12(c).

1. A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings.

2. On motion for judgment on the pleadings, court must accept all factual allegations of the complaint as true and motion is granted when movant is entitled to judgment as a matter of law. Westlands Water District v. U.S. Dep't of Interior, 805 F.Supp. 1503, 1506 (E.D. Cal. 1992), aff'd 10 F.3d 667 (9th Cir. 1993).

3. If matters outside the pleading are presented to and not excluded by the court, motion is treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(c); Latecoere International, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994).

D. Other Rule 12 Motions.

1. Motion for more definite statement. Fed. R. Civ. P. 12(e). Proper when pleading to which a responsive pleading is permitted is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."

2. Motion to strike. Fed. R. Civ. P. 12(f).

a. When? Before responding to a pleading or, if no response permitted, within 20 days of service.

b. What? Any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

E. Motion for Summary Judgment. Fed. R. Civ. P. 56.

1. Summary judgment disposes of cases where there is no dispute as to any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

2. Since summary judgment precludes trial of the case and thus denies litigants their "day in court," it is sometimes referred to as a "drastic" or "extreme" remedy. See Jones v. Nelson, 484 F.2d 1165 (10th Cir. 1973); U.S. v. Porter, 581 F.2d 698 (8th Cir. 1978).

3. Moving party's burden is to show that there is no dispute as to a genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982).

   a. Substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the case will properly prevail on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

   b. Burden is met by the pleadings, depositions, answers to interrogatories, admissions, and any affidavits submitted by the movant in support of the motion. Bell v. Dillard Dep't Stores, Inc., 85 F.3d 1451 (10th Cir. 1996).

   c. Moving party is entitled to summary judgment if after adequate time for discovery the party who will have the burden of proof at trial on an essential element cannot make a showing sufficient to establish the existence of that element. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

4. The responding party need only show a dispute as to a genuine issue of material fact to defeat the motion.

   a. Materials submitted in support of the motion should be viewed in light most favorable to the non-moving party and all reasonable inferences should be drawn in his favor. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

   b. Once a motion has been made and supported by depositions, admissions, affidavits, etc., the opposing party cannot rest upon the allegations in the pleadings; he must respond with affidavits and evidence of his own to create a material issue of fact. Fed. R. Civ. P. 56(e). Adler v. Glickman, 87 F.3d 956 (7th Cir. 1996).

c. When the primary issue is one of intent or state of mind, summary judgment is generally inappropriate. Suydam v. Reed-Stenhouse of Wash., Inc., 820 F.2d 1506 (9th Cir. 1987).

5. Rule 56 in military litigation.

V. CONCLUSION.